No. 13-538

In the Supreme Court of the United States

BERNARD HAWKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

This Court has held that Congress has not authorized federal district courts to grant post-conviction relief to federal prisoners on non-constitutional grounds unless the error resulted in a "complete miscarriage of justice." See *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979); *Hill* v. *United States*, 368 U.S. 424, 428 (1962). The question presented is whether a sentencing court's misapplication of the career-offender provision of the advisory federal Sentencing Guidelines results in a complete miscarriage of justice that is cognizable under 28 U.S.C. 2255(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 24a-48a) is reported at 706 F.3d 820. A supplemental opinion of the court of appeals (Pet. App. 3a-22a) is reported at 724 F.3d 916. Prior opinions of the court of appeals are unpublished but are available at 168 Fed. Appx. 98 (Pet. App. 74a-76a) and 136 Fed. Appx. 922 (Pet. App. 83a-87a).

JURISDICTION

The judgment of the court of appeals was entered on February 7, 2013. A petition for rehearing was denied on July 31, 2013 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on October 28, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2004, following a guilty plea in the United States District Court for the Northern District of Indiana, petitioner was convicted of assaulting a federal officer, in violation of 18 U.S.C. 111(a) (2000 & Supp. III 2003). He was sentenced as a career offender under the then-mandatory federal Sentencing Guidelines to 151 months of imprisonment, to be followed by three years of supervised release. Pet. App. 25a, 65a-66a, 88a-90a. The court of appeals vacated petitioner's sentence in light of *United States* v. *Booker*, 543 U.S. 220 (2005), and remanded for resentencing. Pet. App. 83a-87a. On remand, the district court again classified petitioner as a career offender and reimposed a 151-month sentence. *Id.* at 78a, 95a-127a. The court of appeals affirmed. *Id.* at 74a-76a.

In 2010, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255(a). The district court denied the motion as untimely, Pet. App. 65a-73a, but the court of appeals summarily vacated and remanded, *id.* at 62a. On remand, the district court denied petitioner's motion on the merits. *Id.* at 51a-61a. The court of appeals affirmed. *Id.* at 24a-48a.

1. Petitioner "has a long, long history of violent crimes, gun offenses, escapes, drug use, and violations of supervised release." Pet. App. 25a. In 1979, petitioner was convicted of reckless homicide for shooting and killing a drug dealer. 3/31/04 Presentence Investigation Report (PSR) paras. 31-32. In the early 1980s, he was twice convicted of carrying a handgun without a permit. PSR paras. 33, 35. In 1986, he was convicted of seven federal felonies and sentenced to 12 years of imprisonment for his role in a conspiracy to sell firearms to an undercover agent whom he believed

was affiliated with a violent Chicago street gang. See *United States* v. *Hawkins*, 823 F.2d 1020, 1021-1022 (7th Cir. 1987); PSR para. 37. Petitioner was paroled, but his parole was revoked and he was later transferred to a halfway house in Minneapolis. PSR paras. 38, 40. In July 1995, petitioner signed out of the halfway house and failed to return because he had used cocaine and knew he would be reincarcerated. See *United States* v. *Hawkins*, No. 96-1849, 1996 WL 654067, at *1 (8th Cir. 1996) (per curiam); PSR para. 40. He was arrested without incident in Indiana and was later convicted by a federal jury in Minnesota of escape, in violation of 18 U.S.C. 751. *Hawkins*, 1996 WL 654067, at *1; PSR paras. 39-40.

In February 2000, after a series of further parole violations and revocations, petitioner was again transferred to a halfway house in Indiana to serve the remainder of his term. PSR para. 42. Three weeks later, he left the facility and did not return. PSR paras. 42, 44-45. On June 16, 2000, petitioner attempted to evade police, who were seeking to apprehend him, by ramming a stolen vehicle into a police car, injuring Corporal Jeffrey Trevino. PSR para. 45. Following petitioner's apprehension, a federal jury in Indiana convicted him of escape, in violation of 18 U.S.C. 751. PSR para. 44.

2. On March 26, 2003, petitioner failed to appear at a scheduled federal court hearing, and a warrant was issued for his arrest. PSR para. 5. On May 28, 2003, Deputy United States Marshal Angela Eisele and Officers Titum and Grey from the Gary, Indiana, Police Department located petitioner in an elevator on the seventh floor of his mother's apartment building. PSR paras. 6-8. An extensive chase ensued inside the

building, during which Officer Grey managed to handcuff petitioner to a bannister running the length of the hallway and kick him in the groin. Angered, petitioner pulled the bannister from the wall and verbally threatened to kill the officers while brandishing a small, sharp portion of the broken bannister. PSR paras. 9-10. The officers were eventually able to subdue and handcuff petitioner. PSR para. 11. During the skirmish, Deputy Marshal Eisele and petitioner both sustained cuts. PSR para. 13. Deputy Marshal Eisele was treated for her injuries at a local hospital. PSR para. 14.

In July 2003, a federal grand jury in the Northern District of Indiana returned an indictment charging petitioner with assaulting a federal officer using a dangerous weapon, in violation of 18 U.S.C. 111(a) (2000 & Supp. III 2003). PSR para. 1. The statutory maximum punishment for this offense is 20 years of imprisonment. See 18 U.S.C. 111(b) (2000 & Supp. III 2003). In 2004, petitioner pleaded guilty to the assault charge without a plea agreement. PSR paras. 3, 17. The PSR recommended that petitioner be sentenced as a career offender because his current conviction for assault was a "crime of violence," and his criminal history included "at least two prior felony convictions of * * * a crime of violence," Sentencing Guidelines § 4B1.1(a), *viz.*, his 1995 and 2000 federal escape convictions. PSR paras. 27, 39, 44; see *United States* v. *Bryant*, 310 F.3d 550, 554 (7th Cir. 2002) (conviction for escape under Section 751 "is a crime of violence for purposes of the federal sentencing guidelines"). As a career offender, petitioner faced a then-mandatory Guidelines range of 151 to 188 months of imprisonment. PSR para. 90. Absent the career-offender

enhancement, petitioner's Guidelines range would have been 15 to 21 months of imprisonment.[1]

Before sentencing, petitioner argued that the district court could not find that his escape offenses were crimes of violence consistent with the rule of *Blakely* v. *Washington*, 542 U.S. 296 (2004), that facts (other than recidivism) that increase the maximum penalty for the crime must be submitted to a jury and proven beyond a reasonable doubt. Pet. App. 84a-85a. The court concluded that *Blakely* was inapplicable to the career-offender enhancement and, in accordance with *Bryant*, held that petitioner's escape convictions were career-offender predicate crimes of violence. *Id.* at 85a-86a. The court sentenced petitioner to 151 months of imprisonment, the low end of the Guidelines range, to be followed by three years of supervised release. *Id.* at 89a-90a.

3. Petitioner appealed, arguing that *Blakely* and the then-recent decision in *Booker*, which extended *Blakely* to the federal Sentencing Guidelines, required a jury to determine whether his escape offenses were

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[1] The PSR calculated a total offense level of seven—a base level of six, enhanced by three levels for possession of a dangerous weapon (the broken bannister), and reduced by two levels for acceptance of responsibility. PSR paras. 21-22, 29. (Without the career-offender designation, petitioner would not receive the additional one-level reduction under Guidelines § 3E1.1(b) described in PSR para. 29, because that reduction is available only where the adjusted offense level before any reduction for acceptance of responsibility "is level 16 or greater.") The PSR calculated a criminal history category of VI (the result of petitioner's 13 criminal history points), PSR para. 50, which would result in a non-career-offender Guidelines range of 15 to 21 months of imprisonment. See Sentencing Guidelines Ch. 5, Pt. A (sentencing table).

"crimes of violence" for purposes of the career-offender guideline. See Pet. App. 85a-87a. The court of appeals rejected that claim, but concluded that "the district court erred in applying the guidelines as mandatory" and remanded for the court to resentence petitioner using the now-advisory Guidelines. *Id.* at 86a-87a.

On remand, petitioner argued that his first federal escape conviction was not a crime of violence because he had simply walked away from a halfway house and had not resisted recapture. Pet. App. 102a-105a. Petitioner urged the district court to apply the sentencing factors in 18 U.S.C. 3553(a) and exercise its post-*Booker* discretion to impose a sentence lower than the advisory Guidelines range. Pet. App. 107a-110a. He asserted that the bulk of his violent assault occurred after Officer Grey had kicked him in the groin, that he had "no history of violence," and that he had never been convicted of burglary, robbery, or drug offenses. *Id.* at 107a-108a. He further argued for leniency because he "had been abusing drugs and had not slept for several days" at the time he attacked the officers. *Id.* at 109a. He asked the court to view his offense as a "relatively minor assault" and to impose a prison sentence of 15 to 21 months. *Id.* at 108a.

The government suggested that a 151-month sentence was "fully reasonable and appropriate," Pet. App. 112a, for various reasons, including the fact that, in addition to harming Deputy Marshal Eisele in 2003, petitioner damaged property and injured a police officer during recapture after his first escape, *id.* at 110a-112a. The government also disputed petitioner's claim that he lacked a history of violence and disagreed with his attempts to minimize his offense con-

duct, characterizing it instead as "very serious." *Id.* at 112a. Finally, the government pointed out that Congress in 28 U.S.C. 994(h) had directed that the Guidelines set sentences for career offenders "at or near the statutory maximum" for their offenses, which here was 20 years. Pet. App. 112a.

The district court declined to impose a below-Guidelines sentence. The court recognized that the Guidelines were now advisory, but stated that because the Guidelines had been honed over many years in an attempt to further congressional purposes, it would still give them "considerable weight" in setting the sentence and would not depart absent "clearly identified persuasive reasons." Pet. App. 122a-123a. The court found no such persuasive reasons here and stated that it considered a 151-month sentence "reasonable and appropriate" in light of "the need to impose just punishment[,] to adequately deter criminal violations, and to avoid unwarranted disparity in sentencing." *Id.* at 123a-124a.

The court of appeals affirmed. Pet. App. 74a-76a. The court rejected petitioner's argument that "walkaway escape" is not a crime of violence based on its prior decision in *Bryant*. *Id.* at 75a. The court further concluded that petitioner's 151-month sentence was "within a properly calculated guidelines range" and was "reasonable." *Ibid.* The court stated that, given petitioner's record, the government would have had "a solid argument that a 151-month sentence is too low" in light of the 240-month maximum, and that petitioner's sentence could not be "called too high." *Id.* at 75a-76a.

4. In April 2008, this Court decided *Begay* v. *United States*, 553 U.S. 137, in which it held that re-

sidual clause of the definition of "violent felony" in the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), covers only crimes that "typically involve purposeful, violent, and aggressive conduct." *Begay*, 553 U.S. at 139, 144-145 (internal quotation marks and citation omitted). In January 2009, the Court held in *Chambers* v. *United States*, 555 U.S. 122, that the Illinois offense of failure to report to prison is not a "violent felony" under the ACCA's residual clause, applying the Court's decision in *Begay*. *Id.* at 130.[2] Later that year, the court of appeals, relying on *Chambers*, held that a conviction under the federal escape statute, 18 U.S.C. 751, categorically "is not a crime of violence under the Sentencing Guidelines." *United States* v. *Hart*, 578 F.3d 674, 681 (7th Cir. 2009).

a. On January 13, 2010, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255(a). Citing *Chambers*, he asserted that the sentencing court had incorrectly classified his prior escape convictions as crimes of violence, and he urged the district court to vacate his 151-month sentence and re-sentence him within his non-career-criminal Guidelines range of 15-21 months. The court dismissed petitioner's motion as untimely. Pet. App. 65a-73a. The court reasoned that petitioner's conviction became final within the meaning of 28 U.S.C. 2255(f)(1) in 2006, following his unsuccessful appeal after resentencing. Pet. App. 67a.

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[2] Although *Chambers* does not directly control whether an offense qualifies as a "crime of violence" under the Guidelines, in light of the substantial similarity between the definitions of "violent felony" in the ACCA and "crime of violence" in the Guidelines, the Court's analysis in *Chambers* informs what offenses qualify as crimes of violence under Guidelines § 4B1.2(a)(2).

Although 28 U.S.C. 2255(f)(3) allows a prisoner to file a motion under 28 U.S.C. 2255 within one year of the date that the Supreme Court recognizes a new right that is retroactive to cases on collateral review, the court held this provision did not apply because *Chambers* was not retroactive. Pet. App. 68a-72a.

The court of appeals summarily vacated and remanded for reconsideration in light of *Welch* v. *United States*, 604 F.3d 408, 415 (7th Cir. 2010), cert. denied, 131 S. Ct. 3019 (2011), which held that *Begay* had announced a substantive rule retroactive to cases on collateral review. Pet. App. 62a.

b. On remand, the district court denied petitioner's Section 2255 motion on the merits. Pet. App. 52a-61a. The court explained that petitioner's claim involved a challenge to the sentencing court's application of the now-advisory Guidelines and that non-constitutional claims of error are not cognizable under Section 2255(a) unless the error results in a "complete miscarriage of justice." *Id.* at 57a (quoting *United States* v. *Addonizio*, 442 U.S. 178, 185 (1979)). The court concluded that no miscarriage of justice had occurred here because petitioner's Guidelines sentence was within the 240-month statutory maximum for his crime authorized by 18 U.S.C. 111(b) (2000 & Supp. III 2003), and petitioner remained lawfully exposed to the same 151-month sentence under the advisory Guidelines. Pet. App. 57a-60a. The court further concluded that "even without application of the S[ection] 4B1.1 career offender enhancement," a 151-month sentence was reasonable based on petitioner's extensive criminal history. *Id.* at 60a; see *id.* at 59a (pointing out that petitioner "has never completed an

adult sentence for a federal conviction without violating parole or supervised release").

5. The district court denied a certificate of appealability (COA). Pet. App. 60a-61a. The court of appeals granted a COA and affirmed. *Id.* at 24a-48a, 49a-50a.

a. The court of appeals explained that Section 2255(a) authorizes postconviction relief for a sentence that "was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose . . . or that . . . was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." Pet. App. 27a. The court noted that in *Narvaez* v. *United States*, 674 F.3d 621 (7th Cir. 2011), it had granted Section 2255 relief for a misapplication of the career-offender guideline, "even though the sentence was shorter than the statutory maximum." Pet. App. 27a. The court noted, however, that "Narvaez, as our opinion emphasized, unlike [petitioner], had been sentenced when the guidelines were mandatory." *Ibid.* Thus, the court reasoned, it was at least "arguable" that Narvaez's sentence "exceeded the maximum authorized by 'law,'" see 28 U.S.C. 2255(a), because "[b]efore [*Booker*] the guidelines were the practical equivalent of a statute." Pet. App. 27a.

The court of appeals concluded, however, that the reasoning of *Narvaez* was inapplicable to advisory guidelines errors. Pet. App. 28a (stating that the advisory nature of the Guidelines under which petitioner was sentenced was a "critical difference" from *Narvaez*). The court explained that petitioner's sentence was within the authorized statutory limits for the offense, *ibid.*, and that petitioner remains validly

exposed to reimposition of the sentence by virtue of the advisory nature of the Guidelines—an outcome the court believed entirely reasonable in view of petitioner's extensive criminal record. *Id.* at 33a ("[Petitioner's] criminal record would justify [reimposition of the same sentence."); *ibid.* ("It would be no surprise if a sentencing judge, asked to choose between [a non-career-offender sentence] and 151 months, chose the latter."). For these reasons, the court rejected petitioner's argument that the error that occurred here amounted to a complete miscarriage of justice. *Ibid.* ("[Petitioner] argues in effect that all [Guidelines] errors (except, presumably, harmless ones) are miscarriages of justice, and with that we disagree.").

Judge Rovner dissented. Pet. App. 34a-48a. She would not have distinguished, as did the court, between a career-offender error under mandatory Guidelines and a career-offender error under advisory Guidelines. *Id.* at 34a-37a.

b. Petitioner filed a petition for rehearing en banc. While the petition was pending, this Court decided *Peugh* v. *United States*, 133 S. Ct. 2072 (2013), in which the Court found a violation of the Ex Post Facto Clause when the sentencing court applies the advisory Guidelines in effect at the time of sentencing and that range is more severe than the range in effect when the defendant committed his crimes. *Id.* at 2077-2078. The court of appeals denied the petition for rehearing en banc, Pet. App. 1a-2a, and the panel simultaneously issued a supplemental opinion to "explain[] why a majority of the panel does not believe that rehearing is warranted" in light of *Peugh*. *Id.* at 3a-4a.

The court of appeals noted that the "arguable significance" of *Peugh* for petitioner's case lay in the fact

that the Court held "that an error in calculating a merely advisory guidelines range nevertheless invalidated the sentence." Pet. App. 4a. The court explained, however, that "[t]he issue in this case differs from that in *Peugh* in several respects." *Ibid.* First, *Peugh* involved "constitutional error," which plainly is cognizable under Section 2255(a), whereas petitioner's case "involves no claim of constitutional error." *Ibid.* Second, *Peugh* was a direct appeal, whereas petitioner was seeking postconviction relief and thus bore a heavier burden. *Id.* at 5a. The court noted that even *Peugh* did not hold that the rule it announced was retroactive to cases that became final before it was announced. *Id.* at 5a-6a. Finally, the court observed that allowing collateral review of advisory Guidelines errors would undermine finality and impose significant costs on the judicial system. *Id.* at 7a-9a.

Judge Rovner dissented from the denial of rehearing. Pet. App. 9a-22a. In her view, although *Peugh* involved a claim that a sentence imposed based on a Guidelines miscalculation violated the Constitution, "the reasoning of *Peugh* broadly addressed" the question whether an error in calculating an advisory Guidelines range is a fundamental defect because the Court in *Peugh* viewed the Guidelines as "more than an advisory set of guideposts." *Id.* at 11a.

ARGUMENT

Petitioner contends (Pet. 14-23) that a misapplication of the advisory career-offender sentencing guideline states a cognizable claim for collateral relief under 28 U.S.C. 2255(a). That claim lacks merit. An error in applying an advisory sentencing guideline, without any alteration of the statutory minimum or maximum, or in the court's obligation to impose sen-

tence under 18 U.S.C. 3553(a), does not rise to the level of a complete miscarriage of justice warranting collateral relief. The court of appeals correctly so held. The Eleventh Circuit held to the contrary in *Spencer* v. *United States*, 727 F.3d 1076 (2013), but the government has filed a petition for rehearing en banc in *Spencer*, which remains pending. *Spencer*, Pet. for Reh'g En Banc, No. 10-10676 (filed Sept. 27, 2013). Because only two courts of appeals have considered this issue, and because en banc review by the Eleventh Circuit may eliminate the conflict, review by this Court is not warranted at this time.

1. As enacted in 1948, Section 2255 authorizes federal prisoners to file a motion to vacate, set aside, or correct their sentences on specifically enumerated grounds, *i.e.*, where the sentence "was imposed in violation of the Constitution or laws of the United States, or * * * the court was without jurisdiction to impose such sentence, or * * * the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. 2255(a). This statutory remedy, however, "does not encompass all claimed errors in conviction and sentencing." *United States* v. *Addonizio*, 442 U.S. 178, 185 (1979). As the Court explained in *Addonizio*, "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *Id.* at 184; see *United States* v. *Frady*, 456 U.S. 152, 166 (1982) ("We reaffirm the well-settled principle that to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal.").

In *Hill* v. *United States*, 368 U.S. 424 (1962), the Court held that a claim that the defendant was denied

the right of allocution before sentencing, in violation of Federal Rule of Criminal Procedure 32(a), was not cognizable under Section 2255. *Hill*, 368 U.S. at 425. Such an error, the Court explained, did not present exceptional circumstances meriting collateral review because the error was neither jurisdictional nor constitutional, and did not present a "fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure." *Id.* at 428. In *United States* v. *Timmreck*, 441 U.S. 780 (1979), the Court held that a claim alleging that the district court failed to comply with the requirements of Federal Rule of Criminal Procedure 11 was not cognizable under Section 2255 because, as in *Hill*, the claimed error was neither jurisdictional nor constitutional and did not involve a complete miscarriage of justice. 441 U.S. at 783-784; see *id.* at 783 ("The reasoning in *Hill* is equally applicable to a formal violation of Rule 11.").

After the enactment of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987, and the promulgation of the federal Sentencing Guidelines, the courts of appeals confronted the question whether claims that a sentencing court misapplied the Guidelines to impose a sentence within statutory limits were cognizable under Section 2255. Throughout the 1990s and the early 2000s, relying on *Hill* and *Timmreck*, the courts of appeals uniformly concluded that such claims were non-jurisdictional, non-constitutional claims that did not involve a complete miscarriage of justice and thus were not cognizable. See, *e.g.*, *Knight* v. *United States*, 37 F.3d 769, 772-774 (1st Cir. 1994); *Graziano* v. *United States*, 83 F.3d 587, 589-590 (2d Cir. 1996) (per curiam); *United States* v. *Cepero*, 224

F.3d 256, 268 & n.6 (3d Cir. 2000) (en banc), cert. denied, 531 U.S. 1114 (2001); *United States* v. *Pregent*, 190 F.3d 279, 283-284 (4th Cir. 1999); *United States* v. *Payne*, 99 F.3d 1273, 1281-1282 (5th Cir. 1996); *Grant* v. *United States*, 72 F.3d 503, 505-506 (6th Cir.), cert. denied, 517 U.S. 1200 (1996); *Buggs* v. *United States*, 153 F.3d 439, 443 (7th Cir. 1998); *Auman* v. *United States*, 67 F.3d 157, 160-162 (8th Cir. 1995); *United States* v. *Schlesinger*, 49 F.3d 483, 485 (9th Cir. 1994); *United States* v. *Talk*, 158 F.3d 1064, 1069-1070 (10th Cir. 1998), cert. denied, 525 U.S. 1164 (1999); *Burke* v. *United States*, 152 F.3d 1329, 1331-1332 (11th Cir. 1998), cert. denied, 526 U.S. 1145 (1999).

Following decisions by this Court that prompted the courts of appeals to narrow the scope of "crimes of violence" under the career-offender guideline, see pp. 7-8 & 8 n.2, *supra*, two courts of appeals confronted the question whether an error in treating a defendant as a career offender under mandatory Guidelines constituted a fundamental defect that resulted in a complete miscarriage of justice. In *Narvaez* v. *United States*, 674 F.3d 621 (2011), the Seventh Circuit concluded that such a misapplication resulted in a sentence which "exceeds that permitted by law and constitutes a miscarriage of justice." *Id.* at 623. In *Sun Bear* v. *United States*, 644 F.3d 700 (2011), in contrast, the en banc Eighth Circuit concluded that misapplication of the mandatory career-offender guideline was not a complete miscarriage of justice permitting collateral relief under Section 2255. *Id.* at 705-706.

Petitioner notes this disagreement and urges the Court to resolve the issue. Pet. 21-23. Petitioner's case, however, does not implicate that conflict. In 2005, this Court held in *United States* v. *Booker*, 543

U.S. 220, that the Sixth Amendment right to a jury trial is violated when a defendant's sentence is increased based on judicial fact-finding under mandatory sentencing Guidelines. *Id.* at 226-244. As a remedy, the Court severed 18 U.S.C. 3553(b), which had the effect of making the Guidelines advisory. 543 U.S. at 245. Although petitioner was initially sentenced before *Booker*, the court of appeals remanded his case in light of *Booker* while the case was on direct appeal, and the district court resentenced petitioner under advisory Guidelines. Pet. App. 83a-87a, 78a-79a, 95a-127a. And the Seventh Circuit distinguished its holding in *Narvaez* based on the advisory character of the Guidelines ultimately used in sentencing petitioner. *Id.* at 27a. This case thus does not present any issue concerning a career-offender error under mandatory Guidelines.

Furthermore, the limited disagreement concerning the cognizability of mandatory career-offender guideline errors in collateral proceedings does not have the sort of continuing significance that would warrant this Court's review. The conflict is of diminishing prospective importance because cases involving prisoners who were sentenced pre-*Booker* under mandatory Guidelines are steadily decreasing and will eventually no longer present issues in federal collateral review.

2. Petitioner further contends (Pet. 23-33) that the Seventh Circuit erred in holding that advisory career-offender guideline errors do not warrant collateral relief. He asserts (Pet. 19-21) that the court should grant certiorari to resolve a conflict on whether a claim alleging misapplication of the advisory career-offender guideline is cognizable in a motion for post-conviction relief under Section 2255(a). Only two

circuits have addressed this issue. The Seventh Circuit correctly rejected petitioner's claim for collateral relief, and the en banc process in the Eleventh Circuit may eliminate any conflict on this issue.

a. Petitioner's claim lacks merit. A claim of the sort pressed here, that the sentencing court misapplied the advisory career-offender guideline, is not a claim that may be addressed under 28 U.S.C. 2255.

An erroneous computation of the advisory career-offender guideline does not alter the statutory minimum sentence that a court must impose or the statutory maximum that it may impose. At all times, those boundaries remain fixed by Congress. See *Mistretta* v. *United States*, 488 U.S. 361, 396 (1989) (Guidelines do not usurp "the legislative responsibility for establishing minimum and maximum penalties for every crime," but instead operate "within the broad limits established by Congress"). A defendant's range under the Guidelines provides direction and advice for the sentencing court. The court, however, is bound not by the Commission's advice, but by the statutory obligation to impose a sentence that is sufficient but not greater than necessary to achieve the purposes of sentencing. 18 U.S.C. 3553(a). An error in applying the advisory Guidelines—whether in the career-offender context or in any of the myriad other Guidelines enhancements—is therefore not a fundamental defect that results in a complete miscarriage of justice warranting collateral relief. And the inroad on the finality of sentences would be considerable if every defendant, asserting any advisory Guidelines error,

could claim that his sentence is fundamentally defective and warrants reopening.[3]

This Court's decision in *Addonizio* is instructive. In that case, the Court held that a claim of sentencing error based on the Parole Commission's postsentencing adoption of its release guidelines, which affected the sentencing court's expectation of the time the defendant would actually serve in custody, did not present a fundamental error cognizable under Section 2255 because the actual sentence imposed was "within the statutory limits" and the error "did not affect the lawfulness of the judgment itself," but only how the judgment would be performed. 442 U.S. at 186-187. Although *Addonizio* predates the adoption of the Guidelines, its reliance on the fact that the actual sentence was "within the statutory limits" supports the conclusion that an error in applying the advisory Guidelines does not result in a complete miscarriage of justice redressable under Section 2255.

That principle has all the more force now that the Guidelines are advisory. See *Booker*, 543 U.S. at 245. If petitioner were sentenced today without the career-offender enhancement, he would have a reduced

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[3] Petitioner seeks (Pet. 28-29) to characterize career-offender guideline errors as a unique form of defect, at least where the error became manifest only through a post-conviction appellate decision. But appellate decisions correcting mistaken guideline interpretations are common. And, in the ineffective-assistance context, this Court has warned against trying to decide how long a sentencing error must be to count as prejudicial. See *Glover* v. *United States*, 531 U.S. 198, 203 (2001); Pet. App. 41a (Rovner, J., dissenting). Petitioner's approach thus either must draw an arbitrary line on career-offender errors, see Pet. App. 39a, or open up collateral review to virtually any advisory Guidelines error. The latter course would severely undermine finality interests.

Guidelines range. But after *Booker*, that range is advisory. While the court gives "respectful consideration to the Guidelines," *Kimbrough* v. *United States*, 552 U.S. 85, 101 (2007), "district courts may impose sentences within statutory limits based on appropriate consideration of all of the factors listed in [18 U.S.C.] § 3553(a), subject to appellate review for 'reasonableness.'" *Pepper* v. *United States*, 131 S. Ct. 1229, 1241 (2011) (quoting *Gall* v. *United States*, 552 U.S. 38, 51 (2007)). A sentencing court "may not presume that the Guidelines range is reasonable," *Gall*, 552 U.S. at 50, and "[it] may, in appropriate cases," vary from the advisory range "based on a disagreement with the [Sentencing] Commission's views." *Pepper*, 131 S. Ct. at 1247. Although an error in the court's calculation of the Guidelines may affect the sentencing court's exercise of discretion, it does not alter the "statutory limits" within which the discretion exists or the court's basic obligation under Section 3553(a). Collateral review of an advisory Guidelines error is therefore not justified.[4]

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[4] Every court to have considered petitioner's case has concluded that 151 months of imprisonment was a reasonable sentence for petitioner's crime. See Pet. App. 124a (district court concluded at post-*Booker* resentencing that a 151-month sentence "[was] reasonable and appropriate" in light of "the need to impose just punishment[,] to adequately deter criminal violations, and to avoid unwarranted disparity in sentencing"); *id.* at 75a-76a (court of appeals on direct appeal of petitioner's post-*Booker* resentencing concluded that the sentence was "reasonable" and could not be "called too high," and that the government would even have "a solid argument that a 151-month sentence is too low" in light of the 240-month maximum); *id.* at 60a (district court concluded in rejecting petitioner's Section 2255 motion that, "even without application of the S[ection] 4B1.1 career offender enhancement," a 151-month

Petitioner contends (Pet. 23-27) that the court of appeals' decision "disregard[s]" this Court's decision in *Peugh* v. *United States*, 133 S. Ct. 2072 (2013), in which the Court stated that the Guidelines are the "lodestone" of the sentencing proceeding even in the post-*Booker* era. *Id.* at 2084. But *Peugh* did not address the issue in this case.

The issue in *Peugh* was "whether the Ex Post Facto Clause may be violated when a defendant is sentenced under the version of the Sentencing Guidelines in effect at the time of sentencing rather than the version in effect at the time the crime was committed, and the newer Guidelines yield a higher applicable sentencing range." 133 S. Ct. at 2079. The Court found such a violation even though the higher range was advisory. *Id.* at 2085. As the court of appeals explained, however, *Peugh* was a direct appeal asserting a constitutional error, not, as here, a collateral attack involving a non-constitutional error. Pet. App. 4a-6a. Indeed, a constitutional violation arising from the sentencing court's imposition of an advisory Guidelines sentence would be cognizable even on collateral review. See 28 U.S.C. 2255(a) (collateral relief available for a prisoner "claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution"). But petitioner has never asserted, and no court has held, that misapplica-

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sentence was reasonable based on petitioner's extensive criminal history; *id.* at 33a (court of appeals reviewing denial of petitioner's Section 2255 motion concluded that "[petitioner's] criminal record would justify [reimposition of an identical sentence]" and that "[i]t would be no surprise if a sentencing judge, asked to choose between [a non-career-offender sentence] and 151 months, chose the latter").

tion of the advisory career-offender guideline is a constitutional error. Rather, petitioner's question presented, asking whether advisory Guidelines error is a "miscarriage of justice," Pet. i, assumes that the error is not constitutional. The court of appeals' decision is thus fully consistent with this Court's precedents.

b. The court of appeals' holding represents one of only two decisions on this issue. A panel of the Eleventh Circuit reached the opposite result in *Spencer*, but the narrow conflict does not warrant review at this time. On September 27, 2013, the United States filed a petition for rehearing en banc, urging the full Eleventh Circuit to review the panel decision in *Spencer*. *Spencer*, Pet. for Reh'g En Banc, No. 10-10676. That petition remains pending. Because the panel decision in *Spencer* creates a conflict with the decision in this case, there is a reasonable likelihood that the Eleventh Circuit will grant the petition. See Fed. R. App. P. 35(b)(1)(B); see also *id.*, committee's notes (1998) (explaining that Rule 35(b)(1)(B) contemplates rehearing en banc "when a panel decision creates a conflict"). En banc review by the Eleventh Circuit may resolve any conflict, and review of the issue by this Court therefore would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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